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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM G. MAHONEY & ROY S. DE LON,

Petitioners,

v.

RFE/RL, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Age Discrimination in Employment Act's foreign laws defense, 29 U.S.C. § 623(f)(1), which provides an affirmative defense where compliance with the Act would cause an American employer to violate the laws of the country in which the workplace is located, applies where the employer is relying on a mandatory retirement clause in a collective bargaining agreement with foreign unions?

2. Whether the Age Discrimination in Employment Act's foreign laws defense excuses compliance with the Act by an American employer that has failed to take the steps spelled out in its collective bargaining agreement to renegotiate a mandatory retirement clause?

PARTIES

All of the parties to the proceedings in the Court of Appeals are listed in the caption.

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On Petition for a Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, William G. Mahoney and Roy S. De Lon, respectfully petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1-8) is reported at 47 F. 3d 447. The opinion of the District Court on cross motions for summary judgment (App. 9-16) is reported at 818 F. Supp. 1.

JURISDICTION

The United States Court of Appeals for the District of Columbia entered its judgment on February 28, 1995 (App. 19). Petitioners timely filed a petition for rehearing and suggestion for rehearing in banc, which were denied on April 19, 1995 (App. 17-18). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Age Discrimination in Employment Act's foreign laws defense, 29 U.S.C. § 623 (f)(1), provides, in relevant part, that: "It shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsections (a) . . . where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer . . . to violate the laws of the country in which such workplace is located."

STATEMENT OF THE CASE

Petitioners William G. Mahoney and Roy S. De Lon are United States citizens who worked in Munich, Germany for respondent RFE/RL, Inc., a Delaware corporation better known as Radio Free Europe/Radio Liberty or Radio Free Europe. Mr. Mahoney and Mr. De Lon served with Radio Free Europe for 26 and 27 years, respectively, until respondent terminated them because they had reached the age of 65. The Age Discrimination in Employment Act's (ADEA) coverage of Radio Free Europe's Munich operations became effective October 1984. Radio Free Europe terminated petitioners in March 1987 and October 1988, some two and one half and four years later. The terminations occurred pursuant to a collective bargaining agreement negotiated by respondent with three German unions in Munich which mandated termination of employment at age 65. The agreement, entered in 1982, was of unlimited duration. The agreement states that it may be terminated by either party upon six months notice.

Mr. Mahoney and Mr. De Lon brought suit in the United States District Court for the District of Columbia. Petitioners sought redress for their terminations under the ADEA, 29 U.S. C. § 621 et seq. The jurisdiction of the District Court was invoked, *inter alia*, under 29 U.S.C. § 1331 (general federal question).

The parties filed cross-motions for summary judgment with respect to the foreign laws defense which respondent asserted under 29 U.S.C. § 623(f)(1). Radio Free Europe claimed that the collective bargaining agreement was the law of Germany and that compliance with the ADEA would therefore cause it to violate the laws of the country in which the work place was located.

Construing § 623(f)(1) narrowly because ADEA is a remedial statute, the District Court, per Oberdorfer, J., held that the ADEA's foreign laws defense was inapplicable and granted petitioners' motion for partial summary judgment. The court found two facts crucial to its determination. First, the mandatory retirement provision was part of a contract between Radio Free Europe and the unions, which were all private entities, and was not required in any way by the German government. Second, the provision did not have general application, as laws normally do, but bound only the parties. App. 11.

Subsequently, the District Court conducted a jury trial on the issue of damages. Among the exhibits admitted was a document showing that Radio Free Europe convened an emergency meeting when its purported ADEA compliance mechanism was successful in extending the employment of the first twelve United States citizens to reach age 65 after the effective date of the act. The meeting was called because, in the words of a high corporate official, "this doesn't seem to be what we wanted or expected." At the conclusion of the trial, the jury determined that Radio Free Europe willfully violated the ADEA in terminating petitioners Mahoney and De Lon. The District Court awarded them back pay (reduced by a set off for their Social Security benefits), liquidated damages, and reinstatement.

Radio Free Europe appealed the issue of liability, and petitioners cross-appealed the reduction in damages. The United States Court of Appeals for the District of Columbia Circuit reversed the judgment for petitioners. The Court of Appeals, per Henderson, J., held that Congress intended the words "laws of the country" in 29 U.S.C. § 623(f)(1) to include collective bargaining agreements. The Court relied on *Norfolk & Western Railway v. American Train Dispatchers' Ass'n*, 499 U.S. 117 (1991), where, in construing a statute empowering the Interstate Commerce Commission to approve the consolidation of railroads, this Court interpreted a consolidating carrier's exemption under 49 U.S.C. § 11341(a) "from all other law" to include obligations under a collective bargaining agreement. App. 5-6. The Court of Appeals did not discuss either the principle of narrow construction adopted by the District Court or whether the international context to which the ADEA foreign law defense applies or the purposes of the ADEA require a different result.

The Court of Appeals denied the petition for rehearing and suggestion for rehearing in banc filed by Mr. Mahoney and Mr. De Lon, and this petition follows.

REASONS FOR GRANTING THE PETITION

I. THE INTERPRETATION OF THE ADEA'S FOREIGN LAW DEFENSE PRESENTS AN IMPORTANT QUESTION OF FIRST IMPRESSION THAT WILL SIGNIFICANTLY IMPACT THE ENFORCEMENT OF THE ADEA, TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AND THE ADA.

As the number of Americans working overseas has increased, Congressional concern for the well-being of those employed by American and American-controlled employers has led to increasing extraterritorial protection of working Americans. The Age Discrimination in Employment Act (ADEA) was amended in 1984 to extend its protections to such employees. The 1991 Civil Rights Act, using virtually identical language to that of the ADEA Amendment, expressly provided extraterritorial reach to Title VII of the Civil Rights Act (Title VII), 42 U.S.C. § 2000e-1(b), and to the Americans with

Disabilities Act of 1990 (ADA), 42 U.S. C. § 12112(c).

The U.S. Court of Appeals for the District of Columbia Circuit, in a case of first impression, has now created a gaping hole in the ADEA by permitting Radio Free Europe to continue forcibly to retire employees pursuant to a mandatory retirement provision in its collective bargaining agreement. At the same time, Radio Free Europe admits, with respect to its U.S. based employees, that it could not escape ADEA liability by embedding a retirement requirement in its labor agreement. As a result of the Court of Appeals' decision, American employers will now be able to defend ADEA cases involving employees working abroad by referring to provisions in collective bargaining agreements or, indeed, an individual employment contract. Because the extraterritorial language of Title VII and the ADA was modelled on that of the ADEA, the overseas applicability of these statutes is now equally at risk.

Radio Free Europe's collective bargaining agreement, originally negotiated in 1982, has no termination date. Hence its mandatory retirement provision, absent judicial or legislative intervention, may be forever insulated from the ADEA. This situation is in no way unusual; Belgium, France, Germany, Israel, Sweden, and Turkey are among the countries in which indeterminate labor contracts are used. R. Blanpain, ed., International Encyclopaedia for Labour Law and Industrial Relations (Belgium at p. 242, France at p. 255-56, Germany at p. 140-41, Israel at p. 163, Sweden at p. 182-83, Turkey at p. 240).

Unless overturned, the decision of the U.S. Court of Appeals for the District of Columbia Circuit will create uncertainty regarding the application of civil rights laws to U.S. citizens working abroad and impair the Equal Employment Opportunity Commission's enforcement of these statutes. The Court of Appeals' holding invalidates the Guidelines of the Equal Employment Opportunity Commission which expressly relied on the District Court holding in this case. Enforcement Guidance on Application of Title VII and ADA to Conduct Overseas and to Foreign Employers in the United States, No. 734 (Oct. 20, 1993), 8 Fair Emp. Prac. M. (BNA) 405:6663. The effect

of the Court of Appeals' opinion thus potentially deprives the growing number of Americans working overseas of their statutory protections under the most important federal laws prohibiting employment discrimination.

II. THE COLLECTIVE BARGAINING AGREEMENT IS NOT A LAW OF THE COUNTRY, AND IN ANY EVENT, COMPLIANCE WITH THE ADEA WOULD NOT CAUSE THE EMPLOYER TO VIOLATE THE LAWS OF GERMANY.

The ADEA foreign laws defense states:

> It shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsections (a) . . . where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, . . . to violate the laws of the country in which such workplace is located. (emphasis added)

29 U.S.C. § 623(f)(1).

The questions presented focus on two issues: (1) whether the collective bargaining agreement between Radio Free Europe and the Munich and regional labor unions is a law of Germany within the meaning of the ADEA's foreign laws defense, and (2) whether compliance with the ADEA "would cause" Radio Free Europe "to violate" the laws of Germany. If the first question is answered in the affirmative, then the second issue should be addressed. While the Court of Appeals held the collective bargaining agreement to be law, its opinion contains no informed discussion --- only assumptions --- with respect to the second issue.

Petitioners submit that the Court of Appeals erred in its approach to the first issue, ignoring uncontroversial principles of statutory interpretation. A proper analysis would have resulted in an affirmance of the District Court's holding that the collective bargaining agreement, a contract among private parties, was not a law of the country

within the meaning of the ADEA. Only if the collective bargaining agreement were not law, petitioners contend, could the Court of Appeals justifiably fail to address the second issue.

A. The Court of Appeals Failed to Conduct a Well-Reasoned Analysis of Whether the Collective Bargaining Agreement was the Law of the Country.

Using what might be described as a sound bite approach to statutory interpretation, the U.S. Court of Appeals for the District of Columbia Circuit has given too quick and easy an answer to the question of what Congress meant when it enacted the language "to violate the laws of the country. . . ."

In the Interstate Commerce Act, Congress had exempted a carrier in a consolidation "from the antitrust laws and from all other law, including State and municipal law, as necessary to let [it] carry out the transaction . . . ." 49 U.S.C. § 11341(a). The Supreme Court in *Norfolk & Western Railway v. American Train Dispatchers' Ass'n*, 499 U.S. 117 (1991), construed the statutory exemption "from all other law" to include a carrier's "legal obligations under a collective bargaining agreement." 499 U.S. at 127-28. The U.S. Court of Appeals for the District of Columbia Circuit, without any analysis of the different statutory language and purposes presented by the Interstate Commerce Act and the ADEA, relied on *Norfolk* to hold that the ADEA's "laws of the country" language dictated that here too, a collective bargaining agreement must be considered to be a law. App. at 5-6.

In interpreting the language of the ADEA, the U.S. Court of Appeals for the District of Columbia Circuit failed to note that in *Norfolk* construing the statutory phrase "all other law" to include a collective bargaining agreement was necessary to permit the Interstate Commerce Commission to override contracts that would otherwise have stood in the way of railroad consolidations favored by Congress. The ADEA exemption must also be construed in keeping with the purposes of its statute. *American Airlines Inc. v Wolens*, 115 S.

Ct. 817, 824 n. 6 (1995). And the purpose of the ADEA is to limit, rather than to preserve, freedom of choice in contractual agreements. *McKennon v. Nashville Banner Pub. Co.*, 115 S. Ct. 879, 884 (1995). Since the ADEA is a remedial statute, exemptions to it, absent some other controlling principle, must be narrowly construed. *Lorillard v. Pons,* 434 U S. 575, 577 (1978); *Western Airlines v. Criswell,* 472 U.S. 400, 412 (1985).

B. Interpretation of the ADEA's Foreign Laws Defense Must Take Into Account the International Context of this Statutory Provision.

While analysis should begin by recognizing that the ADEA is an exercise of the Commerce power, *E.E.O.C. v. Wyoming*, 460 U.S. 226 (1983), it is also important to keep in mind that this case, and the relevant provisions of the ADEA, involve the application of the Commerce power in an international context. In such a context, ordinary usage dictates that words such as "laws of the country" must refer to laws of the sovereign. Indeed, in international matters it would often make no sense for courts to interpret a term such as "laws of the country" to include private contracts. See *Sale v. Haitian Centers Council, Inc.*, 113 S. Ct. 2549, 2556 n. 13 (1993) (Exec. Order 12087 authorizes Coast Guard to stop and board vessels engaged in "violations of United States law or the law of a country with which the United States has an arrangement authorizing such action.")

By ignoring the need to construe the ADEA's exemption language narrowly and in keeping with the overall purpose of the statute, the Court of Appeals avoided consideration of the true issue in this case: the nature of an employer's obligation to try to comply with U.S. law when it is a party to a collective bargaining agreement providing for mandatory retirement of its overseas American employees.

C. Compliance with the ADEA Would Not "Cause" Radio Free Europe to "Violate" Foreign Law.

Even if the collective bargaining agreement can be considered to be a law of Germany for purposes of the ADEA's exemption, it must also be determined whether a true conflict between the federal statute and the labor agreement would be caused by Radio Free Europe's compliance with the ADEA. The petitioners submit that the Court of Appeals never analyzed whether a true conflict would occur nor, in the event that it found one, whether it was compliance with the ADEA that caused the conflict.

(1) The Court of Appeals Did Not Consider Settled Principles of Law Applicable When a Party Claims an Inability to Comply both with Its Own and with Foreign Law.

While the Court of Appeals nowhere discussed the object and purpose of the ADEA, it nevertheless did consider the "evident purpose" of the statute's foreign laws exemption. It found this purpose to be:

> to avoid placing overseas employers in the impossible position of having to conform to two inconsistent legal regimes, one imposed from the United States and the other imposed by the country in which the company operates.

App. 7.

Having identified the purpose of the foreign laws exemption, the Court of Appeals assumed, as a matter of fact, the existence of a conflict between U.S. and German law. This assumption was made without acknowledging the body of case law that directs courts how to determine when a true conflict of laws exists.

For many years courts have been confronted with parties who claim

an inability to comply with the laws of several countries that appear to be in conflict. Judicially created, the foreign sovereign compulsion doctrine excuses non-compliance only with respect to a truly innocent party facing serious sanctions from a foreign government in the event of a failure to obey foreign law. It has been invoked, though seldom successfully, by parties seeking to avoid compliance with discovery orders and with substantive requirements of federal law, particularly the U.S. antitrust laws. See generally, Restatement (Third) of the Foreign Relations of the United States, §§ 441 & 442 (Supp. 1995). Most recently, in *Hartford Fire Insurance Co. v. California*, 113 S. Ct. 2891 (1993), this Court grappled with the issue of whether British regulation of the reinsurance industry conflicted with the Sherman Act. Justice Souter, writing for the majority wrote:

> The only substantial question in this case is whether 'there is in fact a true conflict between domestic and foreign law.'

113 S. Ct. at 2910. After pages of thoughtful discussion, the Court, though deeply divided, found no conflict and upheld the application of U.S. antitrust law.

In this case, the Court of Appeals for the District of Columbia Circuit failed to consider, as a matter of law, whether there was a true conflict between the ADEA and German law. Failure to correct its ruling will lead to conflicts of laws being found more readily in civil rights cases than in cases involving commercial activity.

(2) Any Conflict of Law between the ADEA and the Collective Bargaining Agreement was Caused by Radio Free Europe's Willful Failure to Comply with the ADEA.

In the event that provisions of a collective bargaining agreement conflict with the ADEA, it is necessary to consider whether an American company subject to the ADEA is required to renegotiate such a contract. Here, the American employer, subject to the ADEA, failed to take the steps spelled out in its collective bargaining agreement to

set into motion a renegotiation of the mandatory retirement provision, and the jury found a willful violation of the ADEA. This unchallenged jury finding is, under the Seventh Amendment, conclusive on appeal. *Atlantic Gulf Stevedores, Inc. v. Ellerman Lines, Ltd*, 369 U.S. 355, 358 (1962). Petitioners submit that Congress could not have intended the foreign laws defense to serve as a shield for an employer who interposes its own willful failure to comply with ADEA as the cause for a violation of foreign law.

III. CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel gratefully acknowledge the assistance of Ellen Quinn, a Fair Employment Practices Clinic student, in the drafting of this petition.

July 1995

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 23, 1994 Decided February 28, 1995

Nos. 93-7134 & 93-7144.

William G. Mahoney; Roy S. De Lon,
Appellees

v.

RFE/RL, Inc.,
Appellant.

Appeal from the United States District Court for the District of Columbia.
(91cv01842)

N. Frank Wiggins argued the cause and filed the briefs for appellant.

Jane M. Picker argued the cause for appellees. With her on the brief were Kenneth J. Kowalski, Gordon J. Beggs and William Bransford.

Before: SILBERMAN, HENDERSON, and RANDOLPH, Circuit Judges.

Opinion for the court filed by Circuit Judge RANDOLPH.

RANDOLPH, Circuit Judge: If an American corporation operating in a foreign country would have to "violate the laws" of that country in order to comply with the Age Discrimination in Employment Act, 29 U.S.C. § 623(f)(1), the company need not comply with the Act. The question here is whether this "foreign laws" exception in § 623(f)(1) applies when the overseas company, in order to comply with the Act, would have to breach a collective bargaining agreement with foreign unions.

RFE/RL, Inc. is a Delaware non-profit corporation. It is funded but not controlled by the federal government, Ralis v. RFE/RL, Inc., 770 F.2d 1121, 1125 (D.C.Cir.1985), and is best known for its broadcast services, Radio Free Europe and Radio Liberty. RFE/RL's principal place of business is Munich, Germany. In 1982, the company entered into a collective bargaining agreement with unions representing its employees in Munich. One of the provisions of the labor contract, modeled after a nation-wide agreement in the German broadcast industry, required employees to retire at age sixty-five.[1] In 1982, the Age Discrimination in Employment Act had no extraterritorial reach and, from all that appears, this portion of the RFE/RL collective bargaining agreement was entirely lawful. See Ralis v. RFE/RL, Inc., 770 F.2d at 1124.

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[1] Section II.5.a) 5) of the collective bargaining agreement states: Regular employment ends through: retirement; at the latest, however, at the end of the month in which the employee reaches age 65, in which case notice of termination is not required, and/or in accordance with pertinent provision of the RFE/RL Inc. pension plans.

Congress amended the Act in 1984 to cover American citizens working for American corporations overseas. Pub.L. No. 98-459, 98 Stat. 1767, 1792-93 (codified as amended at 29 U.S.C.§§ 623(h), 630(f)). RFE/RL initially thought its American employees in Munich would therefore no longer have to retire at the age of sixty-five, as the collective bargaining agreement provided, and could continue to work until they were seventy if they so chose.[2] In order to implement this understanding, the company applied to the "Works Council" for limited exemptions from its contractual obligation. Works Councils (Betriebsrate) exist in all German firms with twenty or more workers. See Christopher S. Allen, Principles of the Economic System, in GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE; A GERMAN-AMERICAN SYMPOSIUM 339, 348 (Paul Kirchhof & Donald P. Kommers eds., 1993). They are bodies elected by both unionized and nonunionized employees. Their duties include insuring that management adheres to all provisions of union contracts. Departures from contractual requirements are illegal without the Works Council's approval. Rejecting RFE/RL's requests, the Works Council here determined that allowing only those employees who were American citizens to work past the age of sixty- five would violate not only the mandatory retirement provision, but also the collective bargaining agreement's provision forbidding discrimination on the basis of nationality.

RFE/RL appealed the Works Council's decisions with respect to several employees, including plaintiff De Lon, to the Munich Labor Court and lost. The Labor Court agreed with the Works Council that RFE/RL must uniformly enforce the mandatory retirement provisions because exemptions would unfairly discriminate against Germanworkers. The Labor Court also held that the company's retaining employees over the age of sixty-five despite the collective bargaining agreement would be illegal. RFE/RL negotiated

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[2] In 1984 employers were permitted to enforce mandatory retirement of employees reaching the age of 70. Compare Pub.L. No. 95-256, 92 Stat. 189 (1978) with Pub.L. No. 99-592, 100 Stat. 3342 (1986).

with the unions to delete the mandatory retirement provision from the collective bargaining agreement, but to no avail.

The company terminated plaintiff De Lon in 1987, and plaintiff Mahoney in 1988. Both plaintiffs were working for the company in Munich, both are United States citizens, and both were discharged pursuant to the labor contract because they had reached the age of sixty-five. The parties agree that RFE/RL thereby violated the Age Discrimination in Employment Act unless the "foreign laws" exception applied. The Act prohibits employers from discriminating against employees on the basis of age. 29 U.S.C. § 623. "Employee" includes "any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country" (29 U.S.C. § 630(f)); and it is common ground that the Act covers RFE/RL.

On cross-motions for summary judgment, the district court found that company liable for violating the Act, ruling that the "foreign laws" exception (29 U.S.C. § 623(f)(1)) did not apply to breaches of collective bargaining agreements. Mahoney v. RFE/RL, Inc., 818 F.Supp. 1 (D.D.C.1992). The case then proceeded to trial on the issue of damages. A final judgment was entered May 10, 1993. The court amended this in a Revised Order, entered June 8, 1993, and another Order, entered July 7, 1993. RFE/RL appeals the judgment establishing its liability and the award of damages for violating the Act. Mahoney and De Lon cross-appeal the judgment setting the amount of their damages.

The "foreign laws" exception to the Act states:

> It shall not be unlawful for an employer, employment agency, or labor organization:
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where ... such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a

corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

29 U.S.C. § 623(f)(1).

The district court held § 623(f)(1) inapplicable because the mandatory retirement provision "is part of a contract between an employer and unions-- both private entities--and has not in any way been mandated by the German government. Second, the provision does not have general application, as laws normally do, but binds only the parties to the contract." Mahoney, 818 F.Supp. at 3. Although "the mandatory retirement provision in the union contract had 'legal' force in Germany in the sense that it was legally binding," the court found this to be "precisely the sense in which such contracts in this country may be said to have 'legal' force; yet they are not ordinarily thought of as 'laws.' " Id.

The decision of the Supreme Court in Norfolk & Western Railway v. American Train Dispatchers' Ass'n, 499 U.S. 117 (1991), stands firmly against the district court's interpretation. But the parties unaccountably failed to mention the case to the district court, and failed again even to cite the decision on appeal. If Norfolk & Western had been brought to the district court's attention, we have no doubt that it would have ruled the other way.

Norfolk & Western held that a rail carrier's exemption under 49 U.S.C.§ 11341(a) "from all other law" included a "carrier's legal obligations under a collective-bargaining agreement." 499 U.S. at 127. This meaning of "law" was, to the Court, clear and certain. Id. at 133. "A contract," the Court reasoned, "has no legal force apart from the law that acknowledges its binding character." Id. at 130. A contract depends on laws to enforce it and make it effective. Id. To drive the point home the Court quoted extensively from its prior opinions. "The obligation of a contract is 'the law which binds the parties to perform their agreement.' " Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 429 (1934) (quoting Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 197 (1819)). It is the law that gives "legal and binding effect to collective agreements." Detroit & T.S.L.R.R. v. United Transp. Union, 396 U.S. 142, 156 (1969). "Laws which subsist at

the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms. This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge." Farmers & Merchants Bank of Monroe v. Federal Reserve Bank of Richmond, 262 U.S. 649, 660 (1923).

The point of Norfolk & Western is that when a company fails to comply with a labor contract it violates "law," which is why the statutory exemption from "law" relieved carriers of their contractual obligations. Section 623(f)(1) of the Age Discrimination in Employment Act is indistinguishable. See West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98-99 (1991). If RFE/RL had not complied with the collective bargaining agreement in this case, if it had retained plaintiffs despite the mandatory retirement provision, the company would have violated the German laws standing behind such contracts, as well as the decisions of the Munich Labor Court. In the words of § 623(f)(1), RFE/RL's "compliance with [the Act] would cause such employer ... to violate the laws of the country in which such workplace is located." Domestic employers of course would never face a comparable situation; the Supremacy Clause of the Constitution would force any applicable state laws to give way, U.S. CONST. art. VI, cl. 2; and provisions in collective bargaining agreements contrary to the Act would be superseded. Congressional legislation cannot, however, set aside the laws of foreign countries. When an overseas employer's obligations under foreign law collide with its obligations under the Age Discrimination in Employment Act, § 623(f)(1) quite sensibly solves the dilemma by reliving the employer of liability under the Act.

American Airlines, Inc. v. Wolens, 115 S.Ct. 817 (1995), decided after the oral argument in this case, does not alter our decision. The Court there construed a preemption clause in the Airline Deregulation Act of 1978: "[N]o state ... shall enact or enforce any law ... relating to [air carrier] rates, routes, or services." 49 U.S.C. app. § 1305(a)(1). When American Airlines retroactively modified its frequent flyer program, those participating in the program sued in state court claiming that American had violated a state consumer

protection statute and had breached its contract with them. The Court held that § 1305(a)(1) preempted the state consumer protection statute but not the state common law enforcing contracts.

As to the common law, the Court said that American's contracts must have legal force because the stability and efficiency of the market depended on the enforcement of agreements. 115 S.Ct. at 824. But if, because of preemption, the state courts could not invoke common law to enforce American's private contracts, no one could enforce them. The Department of Transportation lacked authority to adjudicate "private contract disputes." Id. at 825. Furthermore, the Federal Aviation Act of 1958, as amended, 49 U.S.C. app. § 1301 et seq., contained a savings clause that had to be squared with the preemption clause. The savings clause preserved "the remedies now existing at common law," 49 U.S.C. app. § 1506. In order to make sense of this provision, and to ensure the continued enforcement of contracts, the Court concluded that the reference to "law" in the preemption clause did not invalidate state contract law. 115 S.Ct. at 826. The Court distinguished Norfolk & Western on the ground that if it interpreted "law" to include "the obligations imposed by contract," as Norfolk & Western had interpreted the term, it could not make "sense of the statute as whole." Id. at 824 n.6.

Unlike the situation in American Airlines, construing the foreign laws exception in the Age Discrimination in Employment Act consistently with Norfolk & Western would not render the Act senseless. Just the opposite. That construction agrees with § 623(f)(1)'s evident purpose--to avoid placing overseas employers in the impossible position of having to conform to two inconsistent legal regimes, one imposed from the United States and the other imposed by the country in which the company operates. Moreover, if American Airlines had ignored the savings clause and preempted state contract law, it would have created an intolerable system in which private contracts would not be legally enforceable. No such problem is presented here. We recognize that RFE/RL's collective bargaining agreement is legally enforceable, which necessarily means that breaching the agreement in order to comply with the Act would, in the language of § 623(f)(1),

"cause" RFE/RL "to violate the laws of" Germany.

Plaintiffs complain that RFE/RL could have bargained harder for a change in the labor contract. But application of § 623(f)(1) does not depend on such considerations. The collective bargaining agreement here was valid and enforceable at the time of plaintiffs' terminations, and RFE/RL had a legal duty to comply with it. There is not, nor could there be, any suggestion that RFE/RL agreed to the mandatory retirement provision in order to evade the Age Discrimination in Employment Act. Such provisions are, the evidence showed, common throughout the Federal Republic of Germany, and RFE/RL entered into this particular agreement before Congress extended the Act beyond our borders.

Because we hold that § 623(f)(1) relieved RFE/RL of liability for terminating plaintiffs, we do not pass on the issue of damages raised in plaintiffs' cross- appeal.

Reversed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA.

William G. MAHONEY, et al.

Plaintiffs,	)	
v.	)	Civ. A. No. 91-1842-LFO
	)	
RFE/RL, INC.,	)	
	)	
Defendant.	)	FILED Nov. 24, 1992

MEMORANDUM AND ORDER

This matter is before the Court on the parties' cross-motions for summary judgment. Plaintiffs claim that defendant, which employed them at its workplace in Munich, Germany, terminated them on the basis of their age in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34. Defendant maintains that German law required it to engage in age- based discrimination and that the ADEA's "foreign laws" exception therefore applies. If defendant prevails on its motion for summary judgment, the action must be dismissed. If plaintiffs prevail on their motion, however, only defendant's liability will be established; plaintiffs will be entitled to proceed to trial and attempt to establish a willful violation of the ADEA, entitling them to double damages under 29 U.S.C. § 626(b). Thus, plaintiffs move for partial summary judgment. For the reasons that follow, defendant's motion for summary judgment will be denied and plaintiffs' motion for partial summary judgment will be granted.

I.

Defendant RFE/RL, Inc. is best known under the names of its broadcast services, Radio Free Europe and Radio Liberty. Defendant is a Delaware non-profit corporation with its principal place of business in Munich, Germany. It employs more than 300 United States citizens at its facility in Munich. Defendant's activities are supported almost exclusively by federal funds, and its funding is subject to action by four Congressional committees. Pursuant to statute,

defendant's operation is overseen by a federal agency, the Board for International Broadcasting (BIB), the members of which are appointed by the President with the advice and consent of the Senate. 22 U.S.C. § 2872. The membership of the BIB and defendant's Board of Directors is the same.

Plaintiffs William G. Mahoney and Roy De Lon were employed at defendant's Munich facility until the time of their terminations. Both were terminated by defendant after, and because, they had reached the age of 65. The union contract covering defendant's employees in Germany expressly provides for mandatory retirement at age 65. The contract, which took effect on April 1, 1982, contains exceptions to the mandatory retirement provision for certain managerial positions and for employees who would qualify for pension benefits within three years. The contract has no termination date but can be changed through a new agreement of the parties.

Plaintiffs brought this action under the ADEA on behalf of themselves and defendant's similarly situated U.S.-citizen employees filing consents pursuant to 29 U.S.C. §§ 216(b) & 626(b).[1]

II.

Summary judgment is appropriate only if the evidence reveals "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The parties do not materially dispute the facts of this case; their dispute is purely a legal one.

Defendant concedes that it terminated plaintiffs because of their age. Moreover, defendant admits that its actions would have violated the ADEA were it not for a statutory exception found at 29 U.S.C. § 623(f):

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[1] It appears that two individuals, Nicolas Munteanu and Vasco Ivanov, have filed consents to participate in this action as party-plaintiffs pursuant to this Court's Orders of February 28, 1992 and March 10, 1992.

It shall not be unlawful for an employer, employment agency, or labor organization--

> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section ... where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer ... to violate the laws of the country in which such workplace is located.... (emphasis added)

Defendant contends--as it must in order to qualify for the exception--that compliance with the ADEA would cause it to violate the laws of Germany.

Defendant's principal argument is that a mandatory retirement age is a deeply embedded concept in German labor practice. Defendant's expert, Professor Spiros Simitis, testified that it is the "general policy of the unions" to insist upon a mandatory retirement age, and that such provisions are contained in the vast majority of collective bargaining agreements in Germany. He also opined that such nearly ubiquitous union-contract terms were considered in Germany to have "legal" force.

However, an expert witness (even one with Professor Simitis's impressive credentials) cannot tell a court how to interpret the word "law" as Congress used it in § 623(f)(1). That is a question of federal law that turns on Congressional intent. See, e.g., United States v. 594,464 Pounds of Salmon, 871 F.2d 824, 826-28 (9th Cir.1989). Professor Simitis testified that the mandatory retirement provision in the union contract had "legal" force in Germany in the sense that it was legally binding. That is precisely the sense in which such contracts in this country may be said to have "legal" force; yet they are not ordinarily thought of as "laws." Two crucial facts about the mandatory retirement provision at issue here remain undisputed by the defendant. First, the provision is part of a contract between an employer and unions--both private entities--and has not in any way been mandated by the German government. Second, the provision does not have general application, as laws normally do, but binds only the parties to the contract.

Defendant's argument based on German labor "practice" and "policy" is unpersuasive. Practices and policies, even when embodied in contracts, are not "laws." The ADEA is a remedial statute and exceptions to it are to be construed \narrowly. Sexton v. Beatrice Foods Co., 630 F.2d 478, 486 (7th Cir.1980) (citing A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493, 65 S.Ct. 807, 808, 89 L.Ed. 1095 (1945)). Although there appears to be no authority directly on point, it is difficult to imagine that Congress intended the term "laws" to extend beyond its ordinary meaning to encompass practices, policies and contracts. Congress knows how to address the "policies or practices" of foreign governments, as it has done expressly in legislation condemning such discrimination in the context of arms trading. 22 U.S.C. § 2755(a) & (b)(1). The foreign laws exception of § 623(f)(1), in contrast, applies only where another country's laws would be violated by compliance with the ADEA.

A hypothetical raised at oral argument is instructive here. Consider a situation in which a foreign country's labor unions came to be controlled by a group committed to the exclusion of a racial minority. It can hardly be doubted that Title VII of the Civil Rights Act of 1964 would not allow a U.S. employer in that country to enforce racist policies under the guise of obeying the foreign labor unions.[2] The ADEA, like Title VII, represents a clear and strong remedial mandate of the United States Congress. Where a foreign labor union policy collides with that mandate, the law of the United States cannot be expected to bow down. This proposition seems to have particular force where an employer is as closely tied to the United States government as the defendant is. It is true that the Court of Appeals for the District of Columbia Circuit has held that defendant is not itself a government-controlled corporation. Ralis v. RFE/RL, Inc.,

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[2] The Civil Rights Act of 1991 extended Title VII to apply extraterritorially. See 42 U.S.C. § 2000e-1(b) & (c) (as amended by Pub.L. No. 102-166, 105 Stat. 1071 (Nov. 21, 1991)) The 1991 Act also added a foreign laws exception nearly identical to that contained in the ADEA. 42 U.S.C. § 2000e-1(b) (an action otherwise prohibited is not unlawful if it "would cause such employer ... to violate the law of the foreign country in which such workplace is located").

770 F.2d 1121, 1125 (D.C.Cir.1985). But the court in Ralis recognized that defendant is federally funded and provided for by Congressional statute; and there is no denying that in many ways, at least functionally, the defendant represents the United States to the world as a quasi-government entity. The exception for conflicting foreign laws, an exception that must be construed narrowly, should not apply in the circumstances presented here.

In response to the above hypothetical, defense counsel at oral argument raised the issue of the timing of the relevant discriminatory action. If the hypothetical racist group took control of the country's labor unions at some point in the future, counsel argued, then it would indeed violate Title VII for a U.S. employer to enforce the racist policies insisted upon by the unions. If, however, the employer's policy had been adopted before Title VII became applicable extraterritorially, then (according to defendant) the employer's ongoing policy would not violate Title VII. Defendant contends that the latter scenario is analogous to the case at bar. The mandatory retirement provision has been part of the union contract since April 1982; but the ADEA has applied outside the United States only since October 1984. See 29 U.S.C. § 623(f) & (g) (as amended by Pub.L. No. 98-459, 98 Stat. 1792 (Oct. 9, 1984)).

Defendant's argument misses the mark. First, it does not go to the issue of whether the foreign labor union "policy" or "practice" is law. Defendant has raised a defense, not of impossibility or futility, but of foreign law. Therefore, it is not sufficient that compliance with the ADEA be difficult or impossible under a contract or under a firmly established national norm; in order to make out a defense under § 623(f)(1), defendant must show that compliance would cause defendant to violate German law. Second, the argument is unpersuasive in any event. It amounts to an assertion that the relevant discriminatory act is the adoption of the mandatory retirement provision (i.e., its incorporation into the union contract in 1982) rather than the application of the provision to the plaintiffs. Although no authority is cited for it, the argument might well rely on the approach taken in cases such as Lorance v. AT & T Technologies, Inc.,

490 U.S. 900, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989), in which the Supreme Court held that the adoption of a facially neutral but discriminatory seniority system is the relevant discriminatory act for purposes of the statute of limitations.[3] Even in Lorance, however, the Court made clear that a facially discriminatory system, like the one in the instant case, can be challenged at any time, because such a system "by definition discriminates each time it is applied." Id. at 912 n. 5, 109 S.Ct. at 2269 n. 5. The timing of events here does not justify application of the foreign laws exception.

In addition to German labor policy, defendant places reliance on five decisions rendered by German labor courts. When the ADEA was amended by Congress to apply to defendant's employees in Germany, defendant initially attempted to accommodate the new law by signing individual employment contracts that allowed certain employees to continue working past the age of 65. However, the company's "works council"--which is bound by German law to give effect to a union contract--rejected the individual contracts because they abrogated the mandatory retirement provision in the union contract.[4] Defendant unsuccessfully appealed to the German labor courts, and it is those courts' decisions that defendant now cites as prohibitive German law.

The labor court decisions, however, involved a narrower issue than that addressed here. Those decisions simply held that the union contract did not permit a retirement age higher than 65; they merely enforced the contract upon the parties to it (in particular, against the defendant). They did not hold that anything in German law compelled the decisions reached. Plaintiffs in this action are challenging

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[3] Lorance was legislatively overruled by the Civil Rights Act of 1991, see 42 U.S.C. § 2000e-5(e)(2) (as amended by Pub.L. No. 102-166, 105 Stat. 1075 (Nov. 21, 1991)), but the reasoning of the case may nevertheless provide authority for defendant's argument.

[4] Presumably the works council (which is a private rather than a government entity) would also enforce a provision that permitted work past the age of 65 if it were included in a union contract.

the application of the contract's discriminatory provision itself, not the lack of individual employment contracts. If overseas employers could avoid application of the ADEA simply by embedding an age-discriminatory provision in a contract, having a foreign court enforce the contract, and calling the court's decision "law," then the Act's extraterritorial provisions would be largely nullified, for employers could easily contract around the law.

Defendant contends that by attempting to utilize individual employment contracts and appealing to the German labor courts, it did all that could be expected of it to comply with the ADEA. It is clear from the undisputed facts, however, that it could have done more to come into compliance. Most important, the defendant did not fully pursue the possibility of achieving an actual change in the union contract. It is true that some of defendant's officers had discussions about the possibility of eliminating the mandatory retirement provision, but these discussions were limited and informal, at least before 1991. Defendant did not pursue serious negotiations with the unions on the issue. In contrast, it did negotiate various other changes in the union contract, including a comprehensive new salary structure effective May 1, 1989. Nor did the defendant pursue the option of mediation in connection with the mandatory retirement issue. Finally, it could have given a six-month notice, as permitted by the agreement's terms, to terminate the contract or a specific provision of it. Defendant argues that all of these possibilities would have been futile, and in particular that a unilateral termination would have been fruitless because the substantive provisions of a union contract remain in effect until a new contract is reached. At the very least, however, when terms of a union contract are terminated, they cease to be binding as rigid rules and the potential thus arises for pursuing both individual contracts and negotiation. See Weiss, Labour Law and Industrial Relations in the Federal Republic of Germany 128 (1987).

In any event, to the extent that defendant has demonstrated a genuine issue of fact as to the "futility" of these various options, the futility arises from the policies of the German labor unions, and not from German law. The defendant is essentially arguing that the German unions simply will not allow it to eliminate the mandatory retirement

policy. But the United States Congress will not allow it to retain the policy. Of the two, only Congress makes law.

Finally, the defendant argues briefly that applying the ADEA to its operations in Munich would violate international law. But defendant does not identify any principle of international law that would be violated by such an application of the law. Where there is a basis for the exercise of jurisdiction (such as nationality) and such exercise is reasonable, U.S. law may properly be applied overseas. See Restatement (Third) of the Foreign Relations Law of the United States §§ 402(2) & 403 (1987); Brilmayer et al., Introduction to Jurisdiction in the American Federal System 302 (1986). Here, there is no actual conflict with German law, Congress has expressed a strong interest in protecting U.S. nationals from age discrimination, and the exercise of jurisdiction is reasonable. Application of the ADEA in the present setting would not result in a violation of international law.

For the foregoing reasons, it is this 24th day of October, 1992, hereby

ORDERED: that plaintiffs' motion for partial summary judgment is GRANTED; and it is further

ORDERED: that defendant's motion for summary judgment is DENIED; and it is further

DECLARED: that defendant is liable to plaintiffs for discharging them because of their age in violation of 29 U.S.C. § 623; and it is further

ORDERED: that the parties shall attend a pretrial conference on January 28, 1993 at 9:30 a.m., in Courtroom No. 3.; and it is further

ORDERED: that the trial in this matter shall commence on February 17, 1993 and is scheduled for 3 days.

/s/ LOUIS OBERDOFER
UNITED STATES DISTRICT JUDGE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 93-7134 **September Term, 1994**
USDC CV 91-1842

William G. Mahoney, et al.,

Appellees,

v. FILED APR 19 1995

Radio Free Europe/Radio Liberty, Inc.,

Appellants

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and Consolidated Case No. 93-7144

BEFORE: Silberman, Henderson and Randolph, Circuit Judges

ORDER

Upon consideration of appellees' Petition for Rehearing, filed March 31, 1995, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert Bonner
Robert Bonner
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 93-7134 **September Term, 1994**
USDC CV 91-1842

William G. Mahoney, et al.,

Appellees,

v. FILED APR 19 1995

Radio Free Europe/Radio Liberty, Inc.,

Appellants

and Consolidated Case No. 93-7144

BEFORE: Edwards, Chief Judge; Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, Circuit Judges

ORDER

Appellees' Suggestion for Rehearing In Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court in banc, that the suggestion is denied.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert Bonner
Robert Bonner
Deputy Clerk

Circuit Judges Buckley and Tatel did not participate in this matter.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 93-7134 **September Term, 1994**
USDC CV 91-1842

William G. Mahoney; Roy S. De Lon,

Appellees,

v. FILED FEB. 28 1995

RFE/RL, Inc.,

Appellant

and Consolidated Case No. 93-7144

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Silberman, Henderson and **Randolph**, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the judgment of the District Court appealed from in this cause is hereby reversed, in accordance with the Opinion for the Court filed herein this date.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert Bonner
Robert Bonner
Deputy Clerk

Date: February 28, 1995
Opinion for the Court filed by Circuit Judge Randolph